

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BUTERA FINER FOODS

and

Case 13-CA-40246-1

UFCW UNIONS AND EMPLOYERS
MIDWEST PENSION FUND

Kevin McCormick, Esq.,
for the General Counsel.
John S. Schauer, Esq.,
(*Seyfarth Shaw*), of Chicago, Illinois,
for the Respondent.
Mindy Kallus, Esq.,
(*Karmel & Gilden*), of Chicago, Illinois,
for the Charging Party.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on November 8, 2002, in Chicago, Illinois, upon a complaint, dated August 30, 2002, alleging that the Respondent, Butera Finer Foods, Inc. violated Section 8(a)(5)(a) and (1) of the National Labor Relations Act (the Act), by ceasing to make pension contributions to the Pension Fund without prior notice to the Union and without affording the Union an opportunity to bargain. The charge was filed by United Food and Commercial Workers Union and Employers Midwest Pension Fund (Pension Fund).

The Respondent filed an answer on October 1, 2002, admitting the jurisdictional aspects of the complaint and denying that it had violated the Act.

On consideration of the entire record, including briefs filed by the General Counsel, the Respondent and the Pension Fund, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, an Illinois corporation, with an office located in Elgin, Illinois, and with stores located in Elgin, Des Plaines, Norridge, and Harwood Heights, Illinois, is engaged in the grocery store business. With gross revenues in excess of \$500,000 and with purchases and receipts at its facilities of goods valued in excess of \$50,000 directly from points located outside the State of Illinois, the Respondent is an employer engaged in commerce within the meaning of

Section 2(2), (6), and (7) of the Act. The Company is headquartered at Clock Tower Plaza, Elgin, Illinois.

5 The United Food and Commercial Workers Union, Locals 881 and 1540 (Local 1540 which merged with Local 546 in 2002 is now Local 1546), herein collectively called the "Union" are labor organizations within the meaning of Section 2(5) of the Act.

Paul Butera, as chairman of the Company since 1968, is a supervisor of the Respondent within the meaning of Section 2(11) of the Act.

Background

10 The Respondent and the Union have been parties to successive collective bargaining agreements, the most recent of which expired on November 21, 2001 (Jt. Exh. 1). According to the agreement and Section 9(a) of the Act, the Union was the exclusive bargaining representative of the following collective bargaining unit:

20 All employees employed by Respondent at its stores currently located in 4761 North Nagle Avenue, Harwood Heights, Illinois, 727 North Golf Road, Des Plaines, Illinois, 3 Clock Tower Plaza, Elgin, Illinois and 4411 North Cumberland, Norridge, Illinois, including employees working in leased and/or licensed departments and all concession departments within the stores; but excluding meat department employees, store managers, guards, professional employees and supervisors as defined in the Act.

25 The parties, represented by Terry DeVito and Elliott Miler for the Union and Paul Butera for the Respondent, negotiated on October 30 and November 12, 2001, for a renewal of the bargaining agreement, but they failed to reach a new agreement on behalf of the grocery clerks.

30 The expired agreement required the Respondent to make monthly contributions to two trust funds, one the Health Fund (United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund) and the Pension Fund (United Food and Commercial Workers Unions and Employers Midwest Pension Fund) (GC Exh. 32). The documents governing these funds were left unsigned by the respective parties; however, the collective bargaining agreement specifically refers to these funds, requiring contributions to both the Pension Funds and the Health and Welfare Fund by the tenth day of each month (Jt. Exh. 1).

40 In the past, the Respondent has made required payments to both trust funds. The Company also made the contributions to the Health and Welfare Fund for the period following the expiration of the bargaining agreement on November 21, 2001, covering the period of December 2001 to March 2002 (GC Exh. 12).

45 In December 2001, Paul Butera, Respondent's chairman and chief executive, decided to discontinue the contributions to the Pension Fund. The decision was implemented in January 2002, when the contributions for the prior month, December 2001 were due (GC Exh. 9, p. 5). Significantly, the Respondent stopped its Pension Fund contributions effective December 2001 and thereafter without notifying the Union or giving the Union an opportunity to bargain.

50 The Union was ultimately decertified on April 2, 2002, pursuant to a decertification petition and an election held on February 21 and 22, 2002 (Tr. 16).

Analysis

The issue in this case is whether the Respondent lawfully discontinued its contributions to the Pension Funds without notice to the Union and without affording the Union an opportunity to bargain. The General Counsel argues that the Respondent unilaterally changed the terms and conditions of employment for the unit employees after the expiration of the contract at a time when the Respondent continued to have an obligation to bargain with the Union, and that the Company's unilateral change violated the Act. The Respondent argues that the Company did not violate the Act, because it was required or obliged to maintain the status quo of making contributions to the Fund only during the effectiveness of the contract or its extension and not thereafter, that the Union waived the Company's obligation by its failure to negotiate the matter for the period after the expiration of the contract, and that the Union lost its majority status among the employees.

Relevant to a resolution of the issues are the following *undisputed* facts: The collective bargaining agreement which expired on November 21, 2001, provided for the Company's obligation to make contributions to the Pension Fund. The respective parties met on two occasions, October 30 and November 12, 2001, to negotiate an extension to the contract, but the parties never discussed the subject of the pension fund contributions. Another meeting, which had been scheduled, failed to take place, but the parties did not reach an impasse in their negotiations. Butera admitted in his testimony that he decided at the end of December 2001 to discontinue the pension fund contribution, because he "found out that they were going for decertification." Pursuant to a petition filed on January 15 2002, and a stipulated election agreement approved on January 29, 2002, an election was held on February 21 and 22, 2002. The Union lost and was decertified on April 2, 2002.

The Board has consistently held that "pension, health, and welfare plans provided for by the expired contract constituted an aspect of employee wages and a term and condition of employment which survived the expiration of the contract and could not be altered without bargaining." *Peerless Roofing Co.*, 247 NLRB 500, 503 (1980); *Harold W. Hinson*, 175 NLRB 596 (1969); *Cauthorne Trucking*, 256 NLRB 721 (1981), see also, *KBMS, Inc.* 278 NLRB 826 (1986); *The Post Tribune Co.*, 337 NLRB No.192 (September 12 2002). An employer is therefore prohibited from discontinuing the pension fund payments, unless, (1) the parties had reached an impasse in their bargaining, (2) the Union had lost its majority status or the employer can demonstrate a good-faith doubt of the Union's majority status, and (3) the Union had waived its right to bargain about the contributions.

Here, the record shows that the Respondent met none of these exceptions. Clearly, the parties did not reach an impasse in their negotiations. They simply failed to meet for their third scheduled meeting. Indeed, the Respondent has not argued that an impasse had occurred.

The Respondent has also failed to demonstrate that it had a good-faith doubt about the Union's majority status at the time Butera made his decision. "Whether a union is certified or voluntarily recognized, it enjoys a rebuttable presumption of majority status on the expiration of a collective-bargaining agreement." *R.J. B. Knits, Inc.*, 309 NLRB 103 (1992). Butera had merely heard rumors about a decertification petition, but the petition had not yet been filed, and the election had not been held when Butera decided to cease making the contributions. "The filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union." *Dresser Industries, Inc.*, 246 NLRB 1088 (1982). Clearly, according to the standards discussed in *Levitz Furniture Co.*, 333 NLRB No. 105 (March 29, 2001), the Respondent has failed to establish its good-faith doubt.

Finally, the Union clearly had not waived its bargaining rights. A union's waiver in this regard "must be clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S.693 (1983). The Respondent's reliance upon a prior experience with the meat department employees is misplaced. It involved a decertification proceeding with the meat cutters two years earlier. The Union's failure to file an unfair labor practice charge in that connection does not amount to a waiver of its rights under the current set of circumstances. Here, as in *The Post Tribune Co.*, 337 NLRB No, 192, supra, "there was no evidence even of notification to the Union about the changes let alone that the issue was discussed and consciously explored and/or that the Union consciously yielded or clearly and unmistakably waived its interest in the matter."

In agreement with the positions of the General Counsel and the Union, as well as that of the Midwest Pension Fund, I find that the Respondent violated Section 8 (1) and (5) of the Act.

Conclusions of Law

1. Butera Finer Foods, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The United Food and Commercial Workers Union, Locals 881 and 1540, the "Union," have been labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Respondent at its stores currently located at 4761 North Nagle Avenue, Harwood Heights, Illinois, 727 North Golf Road, Des Plaines, Illinois, 3 Clock Tower Plaza, Elgin, Illinois and 4411 North Cumberland, Norridge, Illinois, including employees working in leased and/or licensed departments and all concession departments within the stores; but excluding meat department employees, store managers, guards, professional employees and supervisors as defined in the Act.

4. The Union and the Respondent have been parties to a collective bargaining agreement, which expired on November 21, 2001.

5. By unilaterally ceasing payments into the United Food and Commercial Workers Unions and Employers Midwest Pension Fund upon the expiration of the collective-bargaining agreement between the Respondent and the Union, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above-described unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in an unfair labor practice, the Respondent must be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must make the employees whole by paying all pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid and which should have been paid absent Respondent's unlawful unilateral discontinuance of such payments.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Butra Finer Foods, Inc., to officers, agents, and assigns shall

1. Cease and desist from

(a) Unilaterally, without notice to the Union and without affording the Union an opportunity to bargain, ceasing to make pension contributions to the Pension Fund.

(b) In any like or related manner interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make his employees whole by paying all the pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until April 2, 2002, the date of the Union's decertification.

(b) Within 14 days after service by the Region, post at its facility in Elgin, Illinois copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 12, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C., April 9, 2003.

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Karl H. Buschmann
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL not unilaterally change terms and conditions of employment, including the Pension Fund Contributions for our employees in the bargaining unit represented by the Union.

WE WILL NOT in any like or related manner interfere with restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, restore the Pension Fund contributions for our unit employees to April 2, 2002, and WE WILL make the employees whole for any losses they may have suffered as a result of our unilateral actions.

BUTERA FINER FOODS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.